Case Number:	Civil Case 214 of 1978
Date Delivered:	18 Jun 1980
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Alister Arthur Kneller
Citation:	R M v Gayatri Engineering Works [1980] eKLR
Advocates:	-
Case Summary:	**R M *v* Gayatri Engineering Works** High Court, at Mombasa June 18, 1980 Kneller J Civil Case No 214 of 1978 ***Negligence*** *- contributory negligence - when can an employee aged sixteen be said to have contributed to injury during the course of employment - contributory negligence and proportion thereof - failure to use protective goggles where those provided by the employer were defective - where demand for goggles causes threat of loss of job - existence of notice that work must be done with protective eye goggles when none were provided.* ***Employment*** *- injury in the course of duty/employment – failure to provide safe working environment; is this a breach of the employment contract?* ***Factories Act*** *- standard of proof of existence of statutory duty to provide protective clothing as per Section 54(1).*

	The plaintiff a minor aged sixteen years was employed by the defendant. He was injured during the course of employment. The plaintiff contended that the defendant did not provide protective appliances therefore was in breach of statutory duty under the Factories Act Section 54(1). The defendant argued that it did provide these appliances and that the plaintiff had failed to use them and therefore was negligent to an extent. The defendant further argued that even though the available protective goggles were defective, there was a spare one in the store. **Held :** 1. It is not enough for an employer to provide a safe working system or appliance, he must also ensure that the system is followed and the appliance used. 2. The existence of spare goggle in the store does not discharge the employer from liability. 3. The employer having failed to ensure and to see as far as it is reasonably possible that the system worked was in breach of the statutory duty under the Act. Plaintiff has further proved beyond the balance of probabilities that the defendant was guilty. 4. Even if there had been no statutory breach (which was not the case), there would be a breach of its common law duty and it was proved that the defendant was in breach of this common law duty. 5. The plaintiff was 50% responsible for the injury hence contributory negligence. *Appeal dismissed.* **Cases** No case referred to. **Statutes** Factories Act
Court Division:	Civil
History Magistrates:	-

County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 214 OF 1978

R.M.....P
LAINTIFF

VERSUS

GAYATRI ENGINEERING WORKS.....DEFENDANT

JUDGMENT

Mr R M, aged sixteen at the time, was employed by the Gayatri Engineering Works on June 3, 1977 as an apprentice in their workshop at Liwatoni Road, Mombasa at a monthly wage of Kshs 100.

When he was using a small portable electrical grinder there smoothing down some recently welded metal a small piece of metal broke off and flew up into his right eye and perforated it. He cannot see out of it any more.

He sued, through his brother and next friend, the Works for special damages, general damages, costs and interest. The parties agreed the special damages at Kshs 550 and general damages at Kshs 70,000.

There were four issues. Did M , the plaintiff, prove on the balance of probabilities his injuries, loss and damage were caused by a breach of statutory duty on the part of the defendant, its servants or agents because they did not protect the eyes of the plaintiff by providing suitable goggles or effective screens (Section 54(1) of the Factories Act)" Did the plaintiff prove by the same yardstick that the defendant did not take all reasonable precautions for the safety of the plaintiff while he was their employee, shield him from the risk of damage or injury of which the defendant knew or ought to have known, failed to provide and maintain adequate and suitable plant and appliances to enable the plaintiff to carry out his work in safety, and to provide and maintain a safe and proper system of work and so were in breach of their contract of employment" Finally, if the defendant were liable on either or both those claims, was the accident contributed to by the negligence of the plaintiff" If so, in what proportion"

Evidence was recorded from an eye specialist, Mr Ved, the plaintiff, another apprentice employed by the defendant at the same time as the plaintiff, Mr Justin Mwandoe, and a partner in the defendant firm, Mr Vadgama.

The plaintiff asserted the defendant had to provide suitable goggles or effective screens to protect the eyes of the plaintiff because he was dry grinding metals applied by hand to a revolving wheel or disc driven by mechanical power.

Paragraph 1, Fourth Schedule, Section 54(1) Factories Act. The plaintiff did not have any protection for his eyes on June 3, because he said the defendant had only one pair which was not defective for fifteen or so employees doing this work and that pair was being used by a fellow employee, Mr Nzaka,

who had taken another portable electric grinder to do the same work on the house of a customer at Nyali. He could not refuse to do this work until he was given a pair because he was told by Mr Vadgama to get on with it or lose his job.

The workshop of the defendant is one large big room. Near a large fixed grinder there is a board which has the words ‘Danger. Use goggles before using grinder’. This board is about seven feet from the wall. The words are in red painted letters on a white painted background. The word ‘Danger’ is in much larger letters than the rest. The plaintiff and other apprentices who gave evidence could read English and had seen this board. They had had some training at the Maganlal Chandaria Youth Centre in Port Tudor, Mombasa during 1976. This included theoretical instruction in grinding work. They knew they should wear goggles for grinding. They had been in the defendant’s workshop for about 11/2 months. They did not know there were any spares in the store. They were not told that there were spare goggles anywhere else. They saw Mr Vadgama guarding his eyes when he did grinding work with ordinary dark lens spectacles or sun glasses. The foreman, Omari, and his successor Mr Eliud, wore protective goggles when they did grinding from time to time and sometimes they did not wear them. The apprentice who gave evidence, Mr Justine Mwandoe, also suffered an injury in his eye while he was grinding but mercifully it was not as serious as the one the plaintiff had.

The accident occurred at 4.30 pm while the plaintiff was bending over a metal grill and applying it to a revolving portable electric grinder. There was only one pair of goggles hanging underneath that warning sign and it had only its left hand lens in it. The right hand one was missing and would have been, as it turns out, no protection for the right eye of the plaintiff. They both denied that they deliberately avoided wearing protective goggles. They refused to admit that they were defying the orders of Vadgama or one or both foremen or that they were just too lazy to put on a pair of goggles. They did not agree that wearing goggles made their grinding work more difficult.

Vadgama’s story was quite different. He is one of two partners in these Works which was began in 1972. The firm employs four permanent workers and five or six casual labourers. It depends on what work has to be done. They also take in these apprentices from the local training school. They took on the plaintiff in September 1977 or rather they reinstated him there. He was not efficient at any or in this work by June 3, 1977 because he was still being trained. He had to have Elias Omolo, a foreman, guiding him in all his work.

They had safety equipment for their employees which included fire extinguisher, First Aid Kit, guards over their machines, face shields for welders and protective goggles for welders and grinders. The goggles were of the latest model and they were in use when the accident occurred. There were two such goggles: one for the portable machine handlers and one for whoever used the fixed bench grinder. They were kept on hooks on a panel on the wall just underneath these words “warning”. Their staff had to wear them before using the grinders. They had told the foreman to warn the grinders to use the goggles before beginning grinding work. Some workers ignored him and his instructions. They did not wear them when Mr Vadgama was absent. No one was using a pair of these goggles at 4.30 pm or thereabout on June 3, 1977. No one was doing any work in Nyali or elsewhere with a portable grinder and or protective goggles from their firm. The plaintiff was the only employee using any of these grinders and he could have had effective protective goggles.

He did not see the accident happen to either the plaintiff or other apprentice Mr. Justin Mwandoe.

He denied that he and his partner and/or the foreman did not warn the plaintiff and or the others to use goggles. Had there been no protective goggles or insufficient goggles the partners would not expect any of their employees to do any grinding work. The plaintiff had been specifically told by Mr Vadgama

himself once or twice not to carry on grinding without wearing protective goggles. The plaintiff put them on. Mr Vadgama told him he would dismiss him if he did this again. He had not sent him any warning in writing. He could not watch the plaintiff all the time because there were other employees to supervise and other work to do in the factory.

Mr Vadgama declared that he saw the plaintiff wearing goggles across his eyes and then up on his forehead from time to time on June 3, 1977 between 3 pm to 4.30 pm. The piece flew up into the plaintiff's eye when the plaintiff had these protective goggles pushed up on his forehead. He did not tell the learned advocate about this so it did not appear in the written statement of defence. He forgot to do so though he realized how important it was.

Broken goggles, Mr Vadgama swore, were thrown away. He then admitted that there were some old broken smashed ones on the floor near the fixed grinder on the bench when the plaintiff's advocate visited the factory before one of the days when this action was being heard. These were, Mr Vadgama maintained, not in use. The firm did not have any stock book which might have revealed when it purchased or sold goggles. There was certainly not one pair with only one lens on those hooks on June 3, 1977 in their factory. He always wore goggles himself when he did grinding work. He did not remember Mr Justin Mwandoe reporting any injury to either of his eyes to him.

He could not lay his hands on any letter from the firm to the advocates for the plaintiff saying "the accident occurred because the plaintiff was not wearing goggles which he knew he should for grinding".

No one called the workman, Mr Nzaka, who was said to have the only one good pair of protective goggles on June 3 out at Nyali or either Mr Omari or Mr Elias Omolo, the gentlemen who were successively the foremen of the workers in this workshop.

The account given by Mr Ved, the plaintiff and Mr Justin Mwandoe seemed to be clear and believable and what they said tied up well with the pleadings. Their demeanor in court was calm and assured. Mr Vadgama told a story which was not to be found in any correspondence from his firm or in the pleadings of his advocates. He resiled on another point on whether broken goggles were kept in the factory or thrown away. He did not give this court the impression that what he was saying was the truth of the matter. The witnesses for the plaintiff gave that impression, however, and my re-reading of the recorded word strengthens me in the belief that they were honest witnesses.

The defendant's advocate submitted that the defendant only had to provide suitable goggles for those who were grinding metal in the workshop according to the relevant section of Schedule of the Act. There was no doubt that the employer had put up a large clear readable warning to everyone in the place to wear these goggles when doing this work. The law did not require the employer to do any more. It would be unreasonable and impracticable to require an employer to stand over his employees at all times of the day to see that they used this protection. These were, Mr Vadgama maintained, not in use. The firm did not have any stock book which might have revealed when it purchased or sold goggles. There was certainly not one pair with only one lens on those hooks on June 3, 1977 in their factory. He always wore goggles himself when he did grinding work. He did not remember Mr Justin Mwandoe reporting any injury to either of his eyes to him.

There were five portable grinders and one fixed bench grinder. There was a board behind or above these goggles with an appropriate warning. It was obvious that they could not have been one in use and five spare there as the defendant claimed.

He urged this court to find that there was no question of contributory negligence. The plaintiff was not

an experienced workman and he was obliged to carry out the orders of Vadgama. The plaintiff realized the danger and took the risk and this was in obedience to all this. He could not be found negligent or guilty of contributory negligence. It is not negligent to follow a system or method of work of an employer though he knew it was dangerous.

If this court were to hold that there were sufficient, suitable goggles provided by the firm at the material time, there would be no breach of statutory duty. There would be the common law duty, however, for the workshop to take sufficient care. This would mean a safe system, satisfactory supervision and adequate protection of its employees.

The defendant had not only to provide a safe working system or appliance but to see that the system was followed or the appliance was used. These orders had to be carried out by the employees and the employer must see as far as it is reasonably possible, these orders are carried out. It would not be a discharge of this liability for the partners to have spare goggles in the store. The plaintiff did not know of these spares.

This court's findings are that there was a breach of statutory duty. The defendant did not provide suitable goggles for the plaintiff while he was doing this grinding as it should have done. There was one pair which was being used by someone on work outside. The other pair had only one lens. This was not a suitable pair of goggles.

There was also a breach by the defendant of its common law duty. There were no effective goggles for him to use. The defendant did not see that its orders that they should be used were carried out. The plaintiff did not know that there were goggles in the store. He was not an experienced skilled workman but an apprentice. He did not refuse to use these goggles. He was not negligent and he did not contribute to this accident by any negligence on his part.

I now answer the four issues in this way. First, the plaintiff proved on the balance of probabilities the defendant was guilty of the breach of statutory duty. Secondly, it proved the firm was in breach of its common law duty. Thirdly, the plaintiff was not in any way negligent and did not contribute to this accident. Fourthly and finally, if I am wrong about this last finding then taking into account all the circumstances, so far as the proportion of his negligence was concerned, I would say he was 50% responsible for his injury, loss in damage.

I will now hear what the learned advocates submissions are on the orders that follow.

Dated and Delivered at Mombasa this 18th day of June 1980.

A.A.KNELLER

JUDGE